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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 618

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 450, AFL-CIO,
Petitioner,

v.

CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS, ET AL,
Respondents.

PETITIONER'S REPLY BRIEF

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COMES NOW Petitioner, International Union of Operating Engineers, Local 450,

AFL-CIO, and files this reply brief for the purpose of specifically pointing out that counsel for Respondent has based its argument on a factually incorrect premise, namely, that the trial judge found that the Millwrights claimed[1] the work in question and that there was, therefore, a jurisdictional dispute.

The Trial Court's findings regarding the Millwrights' purported "claim" were as follows:

> "One of the factual disputes in this case has to do with whether or not the Millwrights were claiming the right to operate the crane. Evidence before the Court shows clearly that the Millwrights complained to Ashley-Hickham when iron workers were allowed to operate the crane.

[1] All emphasis in this brief has been supplied by the writer unless otherwise indicated.

Shortly before the commencement of the job in question, Mr. Ashley inquired of Jack O. Fountain, who at that time was the business representative of Millwrights Local 2232, what would happen if the Operating Engineers took action to demand the operation of the crane, and Fountain informed Ashley that if that time ever came they would find a way to claim the work.

There is no question that Fountain had told officials of Operating Engineers that the Millwrights were claiming the right to operate the crane as a tool of their trade.

Fountain explained the action of the Millwrights by explaining that they knew that the operation of the crane belonged to the Operating Engineers, but that they many times made such claims so as to get concessions from other unions on other matters.

From all the evidence, a finding that the Millwrights were claiming the right to operate

the crane in question can be made.

The paramount question, however, is whether the claim being made by the Millwrights was of such a nature as to make it a bona fide jurisdictional dispute between the Millwrights and the Operating Engineers.

If one reads Section 8(b)(4)(D) by itself, there is no question but that Plaintiffs could recover in this case. However, a reading of the Act, and especially its amendments of 1947, shows clearly that Section 8(b)(4)(D) of the Act was not what it would seem to be, reading it apart from the rest of the Act, for at the same time that Section 8(b)(4)(D) was passed, Congress also passed Section 10(k), 29 U.S.C.A. Section 160(k), which provided for the National Labor Relations Board to settle jurisdictional disputes.

* * *

The amendments to the Act of 1947, and especially Sections 8(b)(4)(D) and 10(k) of the Act,

were devised to prevent an employer from being caught in the middle of a genuine jurisdictional dispute between two groups of employees, union or not.

The Taft-Hartley Act itself and the proceedings in Congress during its amendment in 1947 shows clearly that the right of unions to picket was not to be lightly taken away because of the Act or its amendments.

There is no evidence in this case that the Millwrights ever told Ashley-Hickham that if the Operating Engineers were given the job of operating the crane, they themselves would strike. In fact, it is abundantly clear that the Millwrights honored the picket of the Operating Engineers.

* * *

I find, therefore, that under the Act, the protection and claim for damages by an employer under Section 8(b)(4)(D) can only be resorted to in a genuine jurisdictional dispute where two sides of employers

> inform the employer that they will strike if the work is given to the other, or the employer is under contract to assign the work to a particular group. In other words, Section 8(b)(4)(D) of the Act cannot be read literally. If it could, there is no question but that the Plaintiffs in this case would have a good cause of action and would prevail."

It is to be noted that the District Court did not find that the Millwrights claimed the work; but merely said that "a finding that the Millwrights were claiming the right to operate the crane in question can be made." What the District Court did find was that the claim being made by the Millwrights was not of such a nature as to make a bona fide jurisdictional dispute between the Millwrights and the Operating Engineers.

Even if the District Court fell into error in requiring a threat to strike for a violation to exist, the holding was nevertheless correct because the Millwrights did not make an active competitive claim for the work, they simply acquiesed in the plum which the employer had granted them and admittedly knew that the work in question did not rightfully belong to them. Such a "claim" to the work does not constitute a genuine jurisdictional dispute. If this Honorable Court will review the record, it will be apparent that the evidence in this case shows no more than that the Millwrights merely accepted the work and were not willing or even interested in waging a fight

to hold on to it. Ashley-Hickham originally assigned the operation of the crane to the Millwrights for economic reasons (as found by the Trial Court). Please consider this colloquy between Mr. Combs and Mr. Fountain, Business Representative of the Millwrights:

Q. State whether or not you ever told Mr. Ashley that it was not your work and you were not claiming it?

A. Confidentially, Mr. Ashley had been in the turbin business much longer than I had, and he was always trying to figure more ways economically to operate and he knew that the work wasn't any more--the Millwright's work on a turbin job--than it was on a cement plant.

* * *

Q. Well, Mr. Fountain, I would like to ask you this question: If you were not claiming the work, why did your men do it?

A. Because they were assigned the work. They were told to do the work.

Q. Who told them to do the work?

A. Mr. Ashley's supervisor." (App.173-175).

Fountain told the Engineers' Business Agent that on this job "he was going along with Ashley" and doing the work. (App. 125-126).

In its Brief before this Court, Respondent quotes the following testimony:

> "Engineer Business Manager, McMahon admitted that in the past his union had on some occasions permitted other Unions to operate pendant controlled cranes for short periods of time, and that he knew Fountain had told Koch that the Millwrights 'were not claiming the work, but it had been assigned to them and somebody had to do the work.' (App. 160-162)."

Thus it is evident from the above testimony and from all the testimony recited in Respondent's brief, that the Millwrights simply continued to do the work because that was Ashley-Hickham's desire. The Millwrights had nothing to lose--they knew the work did not belong to them; but, they were protected, because the only effective weapon the Engineers could use was the picket, and, once they endeavored to enforce their claim in this manner, the employer has the more powerful Section 303 remedy available to him as a deterrent. In this situation, the Union is deprived of its lawful right to picket and the employer is given a far more comprehensive protection than the drafters of Sections

8(b)(4)(D) and 303 ever in their wildest imagination contemplated.

Further, Petitioner has not, as Respondents contend, couched in vague and shifting terms its descriptions of what constitutes a "genuine" jurisdictional dispute. No rules have ever specifically stated what constitutes a sufficient dispute for a violation of Section 303 to occur, or whether a jurisdictional dispute is a necessary prerequisite to a cause of action based on Section 303. Petitioner submits that the key to determining whether or not a violation of Section 8(b)(4)(D) has occurred is whether the employer has been caught in the dilema contemplated by the statute through no fault of his

own.

The Act outlaws "jurisdictional disputes". A "jurisdictional dispute" arises where the employer has been placed in a situation where he finds it impossible to secure the benefits of stability, not because he refuses to satisfy the unions, but because the situation is such that he cannot satisfy either of them. It was not disputes between an employer and a union that Congress was attempting to outlaw by the passage of Section 8(b)(4)(D), but the cross-fire of an employer being caught between two competing unions. Absent such cross-fire, the dispute is economic rather than jurisdictional.

In Juneau Spruce, Pocahontas and

Montag, the decisions in which Respondents rely heavily upon, there existed an open conflict between two unions.

Petitioner submits that the evidence in the case before this Court does not demonstrate any such conflict as was found in those cases. The facts in the instant case exhibit purely and simply a dispute between the employer, who assigned the work to the Millwrights for economic reasons, and the Engineers. This kind of "dispute" is not of the nature of a jurisdictional dispute within the meaning of Section 8(b)(4)(D).

WHEREFORE, Premises Considered, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted and that this Honorable

Court take jurisdiction and hear the case. In this connection, Petitioner reiterates that the question involved is of such importance and the decisions of the lower courts cloak the question in such ambiguity that this Court should hear the case and write an opinion, if for no other reason than to clarify and define the law applicable to this state of facts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petitioner's Reply Brief was mailed to Mr. V. Reagan Burch of Baker, Botts, Shepherd & Coates, Attorneys for Respondents, 1600 Esperson Building, Houston, Texas, on this 23rd day of October, 1970.

W. ARTHUR COMBS